March 25, 2009

DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner:	Environmental Defense Institute
Date of Filing:	March 10, 2009
Case Number:	TFA-0298

On March 10, 2009, Environmental Defense Institute (Appellant) filed an Appeal from a determination issued to it on February 25, 2009, by the Idaho Operations Office (Idaho) of the Department of Energy (DOE). In that determination, Idaho responded to a request for information the Appellant filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the Department of Energy in 10 C.F.R. Part 1004.[1/] In its determination, Idaho identified and released numerous documents responsive to the Appellant's request. The Appellant challenges Idaho's withholding of information from nine documents. This appeal, if granted, would require Idaho to release the withheld information to the Appellant.

I. Background

On April 10, 2008, the Appellant filed a request with Idaho for documents referring to the Advanced Test Reactor (ATR) that were referenced in DOE/Idaho National Laboratory (INL) "Certification Report No. 29." Request Letter dated April 10, 2008, from Chuck Broscious, President, Board of Directors, Appellant, to Idaho. On February 25, 2009, Idaho released numerous documents in full to the Appellant. Idaho redacted a portion of nine documents. In its Determination Letter, Idaho stated that eight of the redacted documents contain information that is exempt from disclosure under FOIA Exemptions 2. Determination Letter dated February 25, 2009, from Clayton Ogilvie, FOIA Officer, Idaho, to Appellant. The remaining document contained information that was exempt from disclosure under FOIA Exemption 4. *Id.* at 2.

[1/] The request was submitted on April 10, 2008. Because of the broad scope of the request, Idaho has been sending responsive documents to the Appellant in installments as the documents are reviewed and ready for release.

On March 10, 2009, the Appellant appealed, contending that the FOIA exemptions that Idaho cited in its Determination Letter do not apply to the redacted documents. Appeal Letter at 1 received March 10, 2008, from Appellant to Director, Office of Hearings and Appeals (OHA). With regard to the documents where information was withheld under Exemption 2, the Appellant claimed that Idaho's assertion that release of the information could lead to sabotage was an inappropriate reason to invoke the Exemption. According to the Appellant, the circumvention element of Exemption 2 "only protects documents such as agency law enforcement manuals and procedures from public disclosure so that individuals may not use them to circumvent the law or law enforcement measures." *Id.* at 3. Thus, prevention of sabotage would not be a proper justification to invoke Exemption 2. The Appellant also argued that Idaho inappropriately applied Exemption 4 to redact the remaining document responsive to its request.[2/]

II. Analysis

The FOIA requires that documents held by federal agencies generally be released to the public upon request. The FOIA, however, lists nine exemptions that set forth the types of information that may be withheld at the discretion of the agency. 5 U.S.C. § 552(b)(1)-(9). Those nine categories are repeated in the DOE regulations implementing the FOIA. 10 C.F.R. § 1004.10(b)(1)-(9). The DOE regulations further provide that documents exempt from mandatory disclosure under the FOIA shall nonetheless be released to the public whenever the DOE determines that disclosure is in the public interest. 10 C.F.R. § 1004.1. The nine exemptions must be narrowly construed. *Church of Scientology of California v. Department of the Army*, 611 F.2d 738, 742 (9th Cir. 1980) (citing *Bristol-Meyers Co. v. FTC*, 424 F.2d 935 (D.C. Cir.), *cert. denied*, 400 U.S. 824 (1970)). "An agency seeking to withhold information under an exemption to FOIA has the burden of proving that the information falls under the claimed exemption." *Lewis v. IRS*, 823 F.2d 375, 378 (9th Cir. 1987). It is well settled that the agency's burden of justification is substantial. *Coastal States Gas Corp. v. Department of Energy*, 617 F.2d 854, 861 (D.C. Cir. 1980) (*Coastal States*). Exemptions 2 and 4 are at issue in this case.

[2/] In the Appeal, the Appellant also appears to challenge withholdings under Exemptions 3 and 6. However, no portions of the nine documents which the Appellant has requested to receive in full were withheld under either of these Exemptions.

A. Exemption 2

1. Analysis

Exemption 2 exempts from mandatory public disclosure records that are "related solely to the internal personnel rules and practices of an agency." 5 U.S.C. § 552 (b)(2); 10 C.F.R. § 1004.10(b)(2). "Exemption 2 is not limited to internal personnel rules and practices; rather, it is construed more generally to encompass documents that are used for predominantly internal purposes." *Judicial Watch, Inc., v. Dep't of Transp.*, No. 02-566, 2005 WL 1606915, at *9 (D.D.C. July 7, 2005). The courts have interpreted the exemption to encompass two distinct categories of information: (a) internal matters of a relatively trivial nature ("low two" information), and (b) more substantial internal matters, the disclosure of which would risk circumvention of a legal requirement ("high two" information). *See, e.g., Schiller v. NLRB,* 964 F.2d 1205, 1207 (D.C. Cir. 1992). Idaho has claimed that the information at issue in the present case involves only the second category, "high two" information. The courts have fashioned a two-part test for determining whether information can be exempted from mandatory disclosure under the "high two" category. Under this test, first articulated by the D.C. Circuit, the agency seeking to withhold information under "high two" must be able to show that (1) the requested information is "predominantly internal," and (2) its disclosure "significantly risks circumvention of agency regulations or statutes." *Crooker v. ATF*, 591 F.2d 753, 771 (D.C. Cir. 1978) (*en banc*).

Idaho withheld portions of eight documents under FOIA Exemption 2. Idaho explained in its Determination Letter that the information redacted from these eight documents is inherently internal. Determination Letter at 1. Thus, it is "high 2" information and exempt from disclosure under Exemption 2. It further stated that Exemption 2's anti-circumvention protection is applicable in this case because the information identifies "vulnerabilities to sabotage events, system configurations/capabilities that may be exploited and internal procedures for operating the reactor that are inherently internal." *Id.* Idaho stated that it withheld those portions because disclosure of the information "would significantly risk installations and projects that safeguard nuclear materials and facilities." *Id.*

Idaho claimed in its Determination Letter that the information it withheld from the eight documents was "Official Use Only" information. When used by the DOE, the term "Official Use Only" reflects an agency determination that the information in question is protected from mandatory FOIA disclosure under one or more of eight of the exemptions set forth at 5 U.S.C. § 552(b).[3/] *See* DOE Order 471.3, Identifying and Protecting Official Use

[3/] Exemption 1 information can never be "Official Use Only" because such information is classified by executive order.

Only Information. We have previously held that this designation by itself is insufficient as a justification for withholding information under the FOIA because it does not explain how a FOIA exemption is applied, thereby making it impossible for the requestor to formulate a meaningful appeal, and for this Office to evaluate that appeal. *Joseph K. Huffman*, Case No. TFA-0153 (2006).[4/] Therefore, the designation of a document as "Official Use Only" is only a suggestion that the document must be evaluated to determine whether it should be released under the FOIA.

However, we have reviewed unredacted versions of all eight Exemption 2 documents that were released to the Appellant. The United States Court of Appeals for the District of Columbia Circuit has defined predominantly internal information as that information which "does not purport to regulate activities among members of the public . . . [and] does [not set] standards to be followed by agency personnel in deciding whether to proceed against or to take action affecting members of the public." *Cox v. Department of Justice*, 601 F.2d 1, 5 (D.C. Cir. 1979) (*per curiam*) (withholding information including transportation security procedures under Exemption 2). The information that Idaho withheld in this case neither regulates activities among members of the public nor sets standards to be followed by agency personnel. Accordingly, this meets the first prong of the *Crooker* test and is predominantly internal.

The information meets the second prong of the *Crooker* test as well. It is well settled that an agency need not cite a specific regulation or statute to properly invoke the "high two" exemption. *Kaganove v. EPA*, 856 F.2d 884, 889 (7th Cir. 1988); *Dirksen v. HHS*, 803 F.2d 1456, 1458-59 (9th Cir. 1986); *National Treasury Employees Union v. United States Customs Service*, 802 F.2d 525, 530-31 (D.C. Cir. 1986) (*NTEU*). Instead, the second part of the *Crooker* test is satisfied by a showing that disclosure would risk circumvention of general requirements. *NTEU*, 802 F.2d 530-31.

Release of the information at issue in the present case could allow terrorists or other malefactors to identify vulnerabilities of the ATR and to understand how to sabotage it. Accordingly, disclosure of the information at issue risks circumvention of DOE's efforts to comply with its statutory mandate to provide secure and safe stewardship of nuclear and other dangerous materials. *See, e.g.*, 42 U.S.C. § 2284 (statute prohibiting sabotage of nuclear facilities). Even though this Appellant may have no such intentions, if DOE were to release these documents to the Appellant under the FOIA, we would also be required to release it to any other members of the public who requested it. The Appellant argued that "[t]he 'circumvention' exemption only protects documents such as agency law enforcement manuals and procedures from public disclosure so that individual may not

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[4/] All OHA decisions issued after November 19, 1996 may be accessed at http://www.oha.doe.gov/foia1.asp.

use them to circumvent the law or law enforcement measures." Appeal Letter at 3. The appellant's definition of the limits of Exemption 2 is too narrow. Exemption 2 encompasses documents that are used for internal purposes not just for law enforcement purposes. *Judicial Watch, Inc.*, 2005 WL 1606915, at 9. Therefore, because of the significant danger of circumvention of DOE regulatory security responsibility involved in public release, we find that the information was properly withheld under the "high two" prong of Exemption 2.

2. Segregability

The FOIA requires that "any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection." 5 U.S.C. § 552(b). Thus, if a document contains both exempt information and non-exempt information that is not otherwise exempt from release, the non-exempt information must generally be segregated and released to the requestor. We have reviewed the information that Idaho redacted from the eight documents. Idaho was very careful with its redactions. We believe that none of the information that was redacted could be reasonably segregated.

3. Public Interest

The DOE regulations provide that the DOE should release to the public material exempt from mandatory disclosure under the FOIA if the DOE determines that federal law permits disclosure and it is in the public interest. 10 C.F.R. § 1004.1. Idaho claimed the release of the information would risk circumvention of DOE's efforts to comply with its mandate to provide secure and safe stewardship of nuclear and other dangerous materials. We agree. As we stated above, release of the information could allow terrorists or other malefactors to sabotage the ATR. It is therefore obvious that release of the information would not be in the public interest.

B. Exemption 4

Exemption 4 exempts from mandatory public disclosure "trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. § 552(b)(4); 10 C.F.R. § 1004.10(b)(4); *see National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765, 770 (D.C. Cir 1974). In interpreting this exemption, the federal courts have distinguished between documents that are voluntarily and involuntarily submitted to the government. In order to be exempt from mandatory disclosure under Exemption 4, voluntarily submitted documents containing privileged or confidential commercial or financial information need only be of a type that the submitter would not customarily release to the public. *Critical Mass Energy Project v. NRC*, 975 F.2d 871 (D.C. Cir. 1992), *cert. denied*, 507 U.S. 984 (1993). Involuntarily submitted documents, however, must meet a stricter standard of confidentiality in order to be exempt. Such documents are considered

confidential for purposes of Exemption 4 if disclosure of the information is likely either to impair the government's ability to obtain necessary information in the future or cause substantial harm to the competitive position of the person from whom the information was obtained. *National Parks*, 498 F.2d at 770; *Critical Mass*, 975 F.2d at 879.

Idaho withheld a portion of the document "commercial grade item dedication documentation and receiving inspection documentation" under Exemption 4. Idaho claimed that the redacted information is commercial or proprietary information. The Appellant challenged the appropriateness of Idaho's Exemption 4 application to the redacted information.

An agency has an obligation to ensure that its determination letters: (1) adequately describe the results of searches; (2) clearly indicate which information was withheld, and (3) specify the exemption or exemptions under which information was withheld. *F.A.C.T.S.*, Case No. VFA-0339 (1997); *Research Information Services, Inc.*, Case No. VFA-0235 (1996) (*RIS*). A determination must adequately justify the withholding of documents by explaining briefly how the claimed exemption applies to the document. *Id*. Without an adequately informative determination letter, the requester must speculate about the adequacy and appropriateness of the agency's determinations. *RIS*.

If an agency withholds commercial material under Exemption 4 because its disclosure is likely to cause substantial competitive harm, it must state the reasons for believing such harm will result. *Smith, Pachter, McWhorter & D'Ambrosio*, Case No. VFA-0515 (1999). Conversely, conclusory and generalized allegations of substantial competitive harm are unacceptable and cannot support an agency's decision to withhold requested documents. *Public Citizen Health Research Group v. F.D.A.*, 704 F.2d 1280, 1291 (D.C. Cir. 1983); *National Parks & Conservation Ass'n v. Kleppe*, 547 F.2d 673, 680 (D.C. Cir. 1976) ("conclusory and generalized allegations are indeed unacceptable as a means of sustaining the burden of nondisclosure under the FOIA").

Our review of the Determination Letter indicates that Idaho failed to provide any explanation as to how Exemption 4 applied to any of the information withheld in the document, "Commercial grade item dedication documentation and receiving inspection documentation." The only explanation offered in the Determination Letter was a statement that the document "contains information of a commercial or proprietary nature and as such is redacted pursuant to Exemption 4. Exemption 4 allows a federal agency to withheld 'commercial or financial information obtained from a person [that is] privileged or confidential.' 5 U.S.C. § 552(b)(4); 10 C.F.R. § 1004.10(b)(4)." Determination Letter at 2. While the Determination Letter stated the general Exemption 4 requirements, it did not provide any description of the withheld material or explain how the Exemption applies to

the withheld information. Consequently, Idaho's Determination Letter was inadequate with regard to its Exemption 4 withholding.

In cases where agencies do not provide an adequate determination with respect to a FOIA request, we usually remand the request to the agency with instruction to issue a new determination letter so that the appellant and our Office can understand the rationale for withholding the information. *See Steven C. Vigg*, Case No. TFA-0003 (2002). This is especially important in Exemption 4 cases, where it may not be obvious, without expert information, what competitive harm would result from release of the information. We will remand the matter to Idaho so that it can issue another determination explaining how Exemption 4 applies to the withheld material in that document.

III. Conclusion

The information redacted from the eight documents was properly withheld under Exemption 2. However, Idaho did not provide an adequate determination with respect to Exemption 4. Therefore, we will grant the Appeal in part and remand the matter to Idaho for a further determination on the Exemption 4 withholding.

It Is Therefore Ordered That:

(1) The Appeal filed by Environmental Defense Institute, Case No. TFA-0298, is hereby granted as specified in Paragraph (2) below and is denied in all other respects.

(2) This matter is hereby remanded to the Idaho Operations Office of the Department of Energy, which shall issue a new determination in accordance with the instructions set forth in the above Decision.

(3) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review. Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: March 25, 2009